1981

Quintina Szark And The State of Utah State Department Of Social Services v. Robert L. Sandoval : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

QUINTINA SZAREK and the STATE OF UTAH, by and through Utah State Department of Social Services,	:	
Plaintiffs-Respondents.	:	Case No. 17156
-v-	:	
ROBERT L. SANDOVAL,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third Judicial District Court in and for Salt Lake County, The Honorable Homer Wilkinson, District Judge

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STATEMENT OF NATURE OF THE CASE

Plaintiffs, Quintina Szarek, and the State of Utah, brought this action pursuant to the Utah Uniform Act on Paternity, Section 78-45a-1 et. seq. to establish paternity, obtain reimbursement of sums expended for the necessary support and education of defendant's minor child and for a judgment to establish defendant's future education and necessary support obligation.

DISPOSITION IN THE LOWER COURT

Respondent's agree with and adquisce in defendant's discription of the disposition in the lower courts.

RELIEF SOUGHT ON APPEAL

Respondents submit that defendant's contention has no merit and that the judgment of the District Court should be affirmed.

STATEMENT OF FACTS

Respondents believe that defendant's rendition of the

facts is correct and acquiesce in the discription found in the defendant's brief.

ARGUMENT

POINT I

PUBLIC POLICY AND CASE LAW INDICATE THERE IS NO STATUTE OF LIMITATIONS ON THE DETERMINATION OF PATERNITY

This court's past decision should be dispositive of the issue of whether there is a limitation on the time period within which a suit to determine paternity must be brought. This court stated in Nielsen, State Department of Social Services vs. Lansen, 564 P.2d 113, 114, (1977), "We are unable to find any time limitation as to when a suit may be instituted to determine paternity. The child has an interest in the matter and courts should be reluctant to invent limitations not set out in the statute, especially where minor children may be adversely affected thereby." (Emphasis added) "The only limitation in the Uniform Act on Paternity is that contained in Section 78-45a-3 which limits the father's liability to a period of four years next preceding the commencement of an action." Tito v. Butler, 584 P2d 868, 869 (1978) (Emphasis added)

There are sound public policy reasons to limit to as few as possible the barriers to establish paternity. "Ordinarly a statute limiting the time for bringing an action is considered to be in the public interest in that it prevents groundless actions from being won because of defendant's inability to present evidence. In cases of establishing paternity, there are other public policy considerations such as the need of a minor child for support and the requirement that the man who actually sires the child

required to furnish its support." Nielson, State Department of Social Services vs. Hansen, supra, at 1114.

Other states have recognized those public policy reasons. In declining to apply a general six-year statute of limitations to an action to establish paternity, a New Jersey Court notes,

> "The annotations collected and appearing in 59 A.L.R. 685 et. seq. deal extensively with the subject and seem to indicate that in most instances a paternity action is not barred by lapse of time except in those jurisdictions where a specific Statute of Limitations pertaining to such actions has been enacted. Thus, the rule and the reason for it are stated as follows: In the absence of a specific statute limiting the time for prosecution of bastardy proceedings, it has been held in a number of cases that no statute of limitations is applicable to bar the proceedings. The primary rationale behind this position appears to be that if the State Legislature had intended to place a time limitation upon the bringing of such an action it would have specifically so provided, particularly in view of the fact that a paternity proceeding has as its primary purpose the support and education of the child, rather than the punishment of the father, and in view of the generally excepted rule that the obligation of the parents to support a child, legitimate or illegitimate, is a continuing obligation which terminates only when the child becomes of age. The courts taking this position thus appear to be of the opinion that to apply to a paternity action a Statute of Limitations not specifically provided by the legislature would be to permit the putative father to escape his continuing obligation to support the child (at 709)"

Eisler v. Toms, 389 A2d 529, 520 (1978)

This duty of a father to support his child, whether legitimate or illegitimate, has been codified into statute by

Utah Legislature, U.C.A. Sections 78-45-1 et. seq. Uniform Civil Liability for Support Act and U.C.A. 78-45a-1 et. seq. Uniform Act on Paternity. In enacting these statutes, the legislature did not include a specific statute of limitations for actions brought under these acts, unlike the limitation placed on actions brought under the Bastardy Act, U.C.A. Section 77-60-1 et. seq., see Section 77-60-15 (suit must be brought within four years of the birth of the child). This difference between the Uniform Acts and the Bastardy Act reflects the legislature's intent that the Uniform Acts be remedial in nature to enable a child to enforce his right to support from his father whenever the father fails to provide such support. In not placing a statute of limitations in the Uniform Acts, the legislature also exhibited an intent to protect the public purse from the drain of providing state support to children who would become public charges if their claims to support from their fathers were barred by statue of limitations. The legislature balanced the interests of the state, the child and the father and determined that the only limitation to be placed on the child's right to support would be a limitation on the amount of past due support that may be recovered, see U.C.A. Section 78-45a-3, recovery of past-due support recovered under the Uniform Act on Paternity is limited to the four year period immediately preceding the commencement of the action, U.C.A. Section 78-12-22 recovery of liability for failure to provide support for dependent child barred after passage of eight years from time of accrual. The legislature's intent to permit a child to recover support for any failure to

provide such during the child's minority should not be thwarted by placing an artificial statute of limitation upon an illegitimate child's action to determine paternity and recover support. See Mildred D. v. Oliver P., 112 NYS 2d 987 (N.Y. Family Court 1979), and Joyner v. Lucas, 257 SE 2d 105 (NC App. 1979). Defendant's contention that U.C.A. Section 78-12-25 or U.C.A. Section 78-12-26 bars plaintiffs' action should be rejected due to public policy and past case law.

POINT II

PLACING A THREE OR FOUR YEAR STATUTE OF LIMITATIONS ON SUPPORT ACTIONS OF ILLEGITIMATE CHILDREN CONSTITUTES UNCONSTITUTIONAL DISCRIMINATION IF LEGITIMATE CHILDREN DO NOT SUFFER SUCH LIMITATION.

Respondent agrees that there is an equal protection issue present in this case. However, the equal protection issue is not that which is urged in appellant's brief. Appellant's contention that the time limitation placed in the Bastardy Act compared with the lack of any time limitation in the Uniform Act on Paternity constitutes a denial of equal protection miscontrues the equal protection doctrine. Admittedly, putative father "A" could be required to defend a suit brought under the Bastardy Act, which suit must be brought within four years of the child's birth, and putative father "B" could be required to defend a suit brought under the Uniform Act on Paternity, which suit could be brought at any time, but this is not a denial of equal protection. " Putative fathers have no vested right in not being made a party to a paternity action." In the Interest of W.M.V.

268 NW 2d 781, 786 (ND 1978) quoted with approval in Hill v. Tafoya, 600 P2d. 721 725 (Wyo. 1979). Both "A" and "B", and all other putative fathers are subject to suit under either the Bastardy Act or the Uniform Act on Paternity; all are required to support their biological children. The fact that a father who fails to support his child is subject to different methods of correcting the father's breach of support duty is not a denial of equal protection as long as all fathers who breach their support duty are subject to the same methods of correction. Denial of equal protection could occur if some fathers were subject to only some correction methods and other fathers were subject to other, different correction methods. It does not occur where all fathers are subject to liability for failure to support a child and the child may persue one of various avenues to correct the failure to support.

The real equal protection issue present in this case will arise if appellant's contentions regarding U.C.A. Section 78-12-25 and 78-12-26 are adopted by this court. Such adoption would forever bar illegitimate children from seeking support from their father if three or four years had passed since the child's birth and no suit has been brought while legitimate children could seek support at any times. Such would be unconstitutional discrimination against illegitimate children. As this issue has been lucidly and cogently treated by other courts, respondent, in the interest of grevity, respectfully requests this court to examine Stringer v. Duvoich, 583 P2d 462 (NM 1978); Department of Health

and Rehabilitative Services, in re Gillespie v. West, 378 S2d 1220 (Fla. 1979); and County of Lenoir v. Johnson, 264 SE 2d 816 (NC 1980).

POINT III

ASSUMING ARGUENDO THAT AN ILLEGITIMATE CHILD'S ACTION FOR SUPPORT IS SUBJECT TO A THREE OR FOUR YEAR STATUTE OF LIMITATIONS, SUCH STATUTE IS TOLLED DUE TO THE CHILD'S MINORITY PURSUANT TO U.C.A. 78-12-36.

Assuming arguendo that this court should adopt appellant's contention regarding the applicability of U.C.A. Section 78-12-25 or 78-12-26 to the present action, respondent submits that any statute of limitations has been tolled due to the child's minority. Appellant has cited and quoted from the case of Van Buskink v. Todd, 75 Cal. Rptr. 280 (Cal App. 1969), (Brief at 9), for the position that the present action is either one upon a liability created by statute governed by U.C.A. Section 78-12-26 or an action within the perview of U.C.A. Section 78-12-25. The California court, after the portion quoted by appellant, continues,

> "In either event this action was filed after (emphasis in original) the time limitation had run from the date of the child's birth. Respondent asserts, however, that the statutes were tolled because of the minority of the child. Defendant now claims that (assuming that the child can be considered the real party in interest under the non-discriptive wording of the complaint), because an action under Section 231, Civil Code, would not fall within the types of action specitifed in Chapter 3 of Title 2 of Part 2, Code of Civil Procedure, to which Section 352, Code of Civil Procedure,

> relates. The logic of this argument eludes us since both the Section 335-Section 338, Subdivision 1, limitation (relating to an action upon a liability created by statute), and the Section 343 limitation (relating to an action for relief not herein above provided for), one of the two which the paternity action must fall under, are in said Chapter 3.
>
> We hold that the action should be considered from the standpoint of the child as the real party in interest and that the statute of limitations in the paternity phase of this action was tolled at all times from the birth of the child to the time Shirley (the mother) brought this action in his behalf." Id. at 285.

Utah State, U.C.A. Section 78-12-36 (1), tolls the statute of limitations on actions which do not seek recovery of real property, if the person entitled to bring the action is under the age of majority. U.C.A. Section 78-12-42 requires the disability that tolls a statute of limitation to exist at the time the action accrues. A suit to determine paternity does not seek to recover real property; the real party in interest is the illegitimate child who is attempting to establish paternity for all benefits and responsibilities that arise once the illegitimate child has established paternity; the right to bring that action accrues at the illegimate child's birth; and the illegitimate child is under the age of majority when that right accrues.

Hence, any statute of limitations imposed by U.C.A. Section 78-12-25 or 78-12-26 upon a paternity action would be tolled by U.C.A. 78-12-36 until the child attains the age of majority.

Under the facts of this case, the child, Bernard Ortiz, is still a minor, therefore, this action to determine his paternity is not barred by any statute of limitations.

POINT IV

THE FAILURE OF DEFENDANT'S TRIAL STRATEGY SHOULD NOT ENTITLE DEFENDANT TO ANOTHER TRIAL ONCE HE HAS HAD HIS DAY IN COURT.

A trial attorney has control and exercises his judgment as to trial tactics or strategy, see State vs. McNicol, 554 P.2d 203 (Utah 1976). However, the failure of the chosen trial tactics to achieve the desired result at trial does not require the judicial system to give the defendant another opportunity to relitigate the case. Only if the trial tactics have deprived the defendant of a constitutional right is he given a new trial. Here, defendant's counsel relied on an argument that the plaintiffs' cause of action was barred by a statute of limitations, there was no other basis plead or argued for denying plaintiffs' recovery. Now, on appeal, defendant hedges on his trial tactic and requests the court to remand for a new trial if it does not reverse the District Court and order dismissal of respondent's complaint. Defendant was given full opportunity to present his case and respond to the plaintiff's case. He is bound by his election on how to use that opportunity unless he can show that he was deprived or unknowingly waived a constitutional right, which defendant has failed to do.

CONCLUSION

Public policy considerations legislative intent

expressed in Utah's statutes, prior case law, and constitutional requirements all oppose defendant's contentions that plaintiffs' cause of action is on the amount of past support which may be recovered, this limitation is clearly expressed in Utah's statutes. Even if this Court should adopt defendant's contention regarding the statute of limitations, the operation of such statute is tolled due to the minor child's disability. Defendant's unsuccessful trial tactics are not such as to require a new trial. For these reasons, respondents respectfully submit that the District Court's judgment be affirmed.

Respectfully submitted this_____day of January, 1981

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Salt Lake County Attorney

By_____
GERALD M. CONDER
Deputy County Attorney
Counsel for plaintiffs-respondents

MAILING CERTIFICATE

This is to certify that I have mailed a true and exact copy of the foregoing Respondent's Brief to JENSEN AND LEWIS, 320 South 300 East, Suite 1, Salt Lake City, Utah 84111 and to Craig S. Cook, 3645 East 3100 South, Salt Lake City, Utah 84109, this_____day of January, 1981.

_____